IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 18 of 1995

with

CRIMINAL APPEAL No 199 of 1995

with

CRIMINAL MISC. APPLICATION NO 9277 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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NAGJI SAMANTBHAI BHARWAD

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 18 of 1995
   MR MC BAROT for Petitioners
   MR SS PATEL, APP for Respondent
2. Criminal Appeal No. 199 of 1995
   MR SS PATEL, APP for Petitioner

MR MC BAROT for Respondents

3. Criminal Misc. Application No. 9277 of 2002

MR MC BAROT for Petitioner

MR IM PANDYA, APP for Respondent.

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CORAM : MR.JUSTICE M.H.KADRI

and

MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 08/04/2003

CAV COMMON JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. Both these appeals arise from the common judgment delivered by the Ld. Addl. Sessions Judge, Kheda, Camp at Anand dated 9th December, 1994 in Sessions Case No. 6 of 1994. Criminal Appeal No. 18 of 1995 has been filed by the appellants who were original accused nos. 1 to 3 of that case. Appellant no. 1 is convicted for offence made punishable u/S. 302 of the Indian Penal Code (for short 'IPC') and he has been sentenced to suffer imprisonment for life. Appellants nos. 2 and 3 are convicted for offence made punishable u/S. 325 read with sec. 34 of the IPC and they have been sentenced to suffer RI for 4 years. They have, therefore, challenged this order of conviction and sentence in their appeal. Criminal Appeal No. 199 of 1995 has been filed by the State of Gujarat challenging the acquittal of respondents nos. 1 and 2 of that appeal i.e. appellants nos. 2 and 3 of Criminal Appeal No. 18 of 1995, of the offence made punishable u/S. 302 of the IPC. Since both these appeals involve common questions of fact and law, they are heard together and now they are being disposed of by this common judgment. For the purpose of this judgment they are referred to by their nomenclature in Criminal Appeal No. 18 of 1995.

2. The case of the prosecution in nutshell can be stated as under :-

2.1. The incident in question took place on 4th July, 1993 at about 3.30 p.m. in which one Vaghajibhai Bhikhabhai lost his life. According to the prosecution, present appellant no. 1 and original accused no. 4 - Gagjibhai Sidabhai, who has been acquitted by the trial Court and no acquittal appeal has been filed against him, on the day of incident went to the house of the deceased some time in the afternoon and told him that some cattle was required to be transported

and for that a transport vehicle was required to be hired. They, therefore, requested Vaghajibhai to help them in getting such vehicle. They thereafter proceeded from the house of the deceased for going to Adas to contact one Babubhai, who owned such vehicle. On way, around 3.00 p.m. prosecution witness Karsanbhai Govindbhai met them and he asked Vaghajibhai why he was going with appellant no. 1 and Gagjibhai. Vaghajibhai informed him that appellant no. 1 and Gagjibhai wanted to hire a transport vehicle and, therefore, he was going with them. Karsanbhai, however, warned Vaghajibhai that they did not have any relation with appellant no. 1 and he was on the contrary on inimical terms with them and therefore, he should not go. Vaghajibhai, however, replied that since Gagjibhai was there, there was no cause to worry and he also requested Karsanbhai to go with them. Karsanbhai was quite apprehensive. He, however, agreed to go with the deceased and appellant no. 1 and Gagjibhai. When they reached near a narrow lane leading from Anklavadi to Adas, from a distance Karsan noticed appellants nos. 2 and 3 standing with sticks in their hands. It may be noted here that according to the prosecution, even appellant no. 1 and Gagjibhai at that time were carrying Dhariya and Lathi respectively with them. When Karsan saw appellants nos. 2 and 3 waiting on the road, he immediately warned the deceased that he should not proceed further since he suspected some foul game. He also told the deceased that since the deceased and himself were involved in the case of murder of appellant no. 1's father, it is quite possible that appellant no. 1 and others may take revenge of that. However, deceased did not listen to the warning and on the contrary he told Karsan that since Gagji was there, there was no reason to be so apprehensive. Karsan did not proceed further but the deceased and others kept on walking. When they reached near appellants nos. 2 and 3, appellant no. 1 all of a sudden went slightly ahead of the deceased and turned round and started inflicting Dhariya blows on him. According to the prosecution, appellants nos. 2 and 3 also gave repeated stick blows to the deceased. Karsan on seeing the assault raised shouts for help and thereafter he fled away from the place. On way, brother of the deceased Bhavanbhai met him and he told him that appellants were beating the deceased and that he also cautioned Bhavanbhai that he should not go there as the appellants were armed with deadly weapons. They, therefore, first went to the house of Karsan and informed Karsan's father Govindbhai about the incident. They thereafter proceeded towards Vasad and on way they met Himubhai, popularly known as Himukaka and they told him that they had some fight and he should

inform the police. Subsequently they came back to the place where the incident took place and found that Vaghajibhai had received several injuries and that his hand was fractured and he was already dead. Karsan, therefore, asked Bhavanbhai to go to Baroda and inform the father of the deceased about the incident. Karsan himself started going to Vasad to call the police, but as the P.S.I. met him on the way, he and the P.S.I. came back to the scene of offence. They thereafter returned to the police station where the complaint was given by Karsanbhai. It was around 6.00 O'clock in the evening. The police on receipt of the complaint registered the offence against the appellants and original accused Gagjibhai at C.R. No. 212 of 1993 of Anand Rural Police Station for committing offences u/Ss. 302, 34, 120B of the IPC. In the course of the investigation, the appellants and original accused were arrested. The police recorded statements of various persons acquainted with the facts of the case, drew the panchnamas of various kinds, sent the body of the deceased for post mortem examination and on receipt of the report, it was taken on the record of the investigation. After completing the usual investigation, the police submitted charge-sheet in the Court of the concerned Ld. Magistrate, who in turn committed the case to the Court of Sessions since offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

2.2. At the trial, the Ld. trial Judge framed the charge at Exh. 2 on 8th July, 1994. The appellants and original accused Gagjibhai pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined the following witnesses :-

P.W. 1 - Karsanbhai Govindbhai Exh. 12 at page 53
P.W. 2 - Bhavanbhai Bhikhabhai Exh. 15 at page 64
P.W. 3 - Jogabhai Bhagwanbhai Exh. 16 at page 71
P.W. 4 - Parshottambhai Shanabhai Exh. 18 at page 74
P.W. 5 - Himabhai Chunibhai Exh. 23 at page 78
P.W. 6 - Dineshbhai Jhaverbhai Patel Exh.24 at p. 81
P.W. 7 - Yunusbhai Abdulbhai Vora Exh. 27 at p. 87
P.W. 8 - Beniben Kachrabhai Exh. 28 at page 89
P.W. 9 - Jitendrabhai Manilal Patel Exh. 32 at p. 97
P.W. 10- Mitesh Rameshbhai Shah Exh. 37 at p. 101
P.W. 11- Amarsinh Ajeetsinh Exh. 39 at p. 110
P.W. 12- Pankajkumar Ratilal Bhatt Exh. 41 at p. 114.

It also placed reliance on the documentary evidence such as inquest panchnama Exh. 17, map of scene of offence Exh. 19, Panchnama of scene of offence Exh. 25, post mortem notes Exh. 38 and panchnama regarding discovery

of weapons Exh. 44.

2.3. At the end of the recording of the oral evidence, the statements of the appellants and original accused no. 4 u/S. 313 of the Code of Criminal Procedure were recorded. Their defence appears to be that of general denial.

2.4. At the end of the trial, the learned trial Judge convicted appellant no. 1 for offence u/S. 302 and appellants nos. 2 and 3 for offence u/S. 325 read with sec. 34 of the IPC and sentenced them to suffer the imprisonment as stated above.

3. We have heard Mr. M.C. Barot, the learned advocate for the appellants and Mr. S.S. Patel, Ld. APP for the State of Gujarat. Mr. Barot submitted that the entire story of the prosecution is not believeable and grave doubt can be raised with regard to its veracity. He has further submitted that there is a sole eye witness, whose evidence is very shaky, full of discrepancies and unbelieveable, particularly in view of his unnatural conduct. He has further submitted that the oral evidence is not in consonance with the medical evidence and, therefore also, the case of the prosecution becomes very doubtful. He has, therefore, submitted that his appeal may be allowed and the appellants be acquitted.

3.1. As against that, Mr. S.S. Patel, Ld. APP has supported the judgment of the trial Court to the extent it convicted appellant no. 1 for offence u/S. 302 of the IPC and appellants nos. 2 and 3 for offence u/S. 325 of the IPC. He has, however, assailed the judgment on the ground that the acquittal for offences u/S. 302 of IPC recorded by the Ld. trial Judge in respect of appellants nos. 2 and 3 of Criminal Appeal No. 18 of 1995, who are respondents of Criminal Appeal No. 199 of 1995, is erroneous, because looking to the fact that all had pre-planned to commit murder of deceased Vaghajibhai and they were equally liable by virtue of section 34 of the IPC for the murder of Vaghajibhai and they should have been convicted for offence u/S. 302 read with sec. 34 of the IPC. He has further submitted that the oral evidence of Karsanbhai is trustworthy and it is sufficient to bring home the charge against the accused. He has, therefore, submitted that appeal filed by the original accused nos. 1 to 3 has no merit and it is required to be dismissed. He has further submitted that the State's appeal be allowed.

4. With a view to reappreciate the evidence, we have carefully gone through the record and also have taken into consideration the submissions made by both the learned counsels.

5. First of all we will turn our attention to the medical evidence to find out whether Vaghajibhai died homicidal death. Considering the evidence of P.W. 10 - Dr. Mitesh Rameshchandra Shah, Medical Officer, who has performed the post mortem and also from the notes of post mortem examination, it is clear that Vaghajibhai had died due to injuries received by him during the assault in question. The cause of death recorded by the Medical Officer is shock due to cerebral haemorrhage following injuries on head by sharp cutting instrument. It is, therefore, obvious that the death was a homicidal death and we concur with the finding given by the trial Court on that count.

6. Now, considering the merits of the case, from the record it appears that appellant no. 1 Nagjibhai did not have cordial relations with the deceased and P.W. 1 - Karsanbhai since the deceased and Karsanbhai were previously involved in the murder of one Popatbhai, who happened to be the father of Nagjibhai. However, from the record, it also appears that there was some settlement between them and Karsanbhai and the deceased were required to pay Rs.80,000/= to appellant no. 1 - Nagjibhai by way of compensation. So far the present incident is concerned, P.W. 1 - Karsanbhai seems to be the only person examined as eye witness by the prosecution. The evidence of this witness is challenged by the appellants on various grounds. He has stated before the Court that he had gone to Unnat hotel situated on the highway in connection with his milk business and from there, while he was going to his lands situated on the outskirts of village Anklavadi, he met the deceased in company of appellant no. 1 and Gagjibhai. He was told by the deceased that a vehicle for transporting cattle was to be hired and, therefore, he was going with them to help them in getting the vehicle. Karsan, however, asked him not to go with appellant no. 1. But deceased told him that there was no need to worry since Gagjibhai was with them. They, therefore, proceeded further. When they reached a narrow road leading to Adas, Karsanbhai saw other two appellants i.e. appellants nos. 2 and 3 waiting at some distance with Lathis in their hands. He, therefore, warned the deceased not to proceed further. However, deceased did not listen to him and he kept on walking ahead with appellant no. 1 and Gagjibhai. He has further stated

that when they reached near appellants nos. 2 and 3, appellant no. 1 all of a sudden went slightly ahead of the deceased and started inflicting Dhariya blows on him. Appellants nos. 2 and 3 also started giving blows with sticks. On seeing the assault, he raised shouts and thereafter ran away from the place. He has further stated that he met brother of the deceased, Bhavanbhai on way and informed him about the incident. They also told one Himukaka to inform the police and Bhavanbhai was later on sent to Baroda for calling father of the deceased. According to this witness, he had lodged FIR at 6.00 O'clock at Vasad Police Station. From the cross-examination of this witness, it appears that on meeting Bhavanbhai he did not tell him that the deceased was being assaulted with Dhariya and Lathis by the appellants. It also appears that he has not disclosed the names of the assailants to Himukaka who was asked to inform the police. It also appears that he had not told the names of the assailants to Beniben i.e. widow of the deceased when she was contacted after the incident. It also appears from his evidence that no steps were taken by him and Bhavanbhai to go to the rescue of the deceased immediately. It appears that they were moving from one place to the other and ultimately after about one and half hours of the incident they seem to have again gone to the place of incident where they found that Vaghajibhai had already expired. The FIR came to be lodged almost 3 hours after the incident, though from the evidence of this witness it appears that the police station is closely situated.

6.1. So far the evidence of P.W. Bhavanbhai Bhikhabhai Exh. 15 is concerned, his knowledge is solely dependent on the information that was given to him by Karsanbhai. He also deposes on the line of Karsanbhai. His evidence shows that instead of immediately going to the place of incident to take care of Vaghajibhai, they had moved to different places, according to them for seeking police help and it was only after one and half hours of the incident they had gone to the place of incident. Thus, the evidence of these two material witnesses clearly shows that their conduct is not a natural conduct and they are trying to suppress some material facts. It also appears from the evidence of these witnesses that there was considerable delay in revealing the names of the assailants. In fact Himukaka who was asked to inform the police has not been given any detail of incident by Karsanbhai including the names of the assailants.

6.2. So far Himabhai is concerned, his

evidence is recorded at Exh. 23. He has supported the say of Karsanbhai but he has stated that Karsanbhai had revealed the names to him which does not appear to be true since the information that was divulged to Himabhai is very much on record in the evidence of Karsanbhai himself. Moreover, the information that has been passed on to the police by Himabhai also reveals that no names were given to the police. Himabhai has tried to give an explanation that while he was giving the information the telephone got disconnected and thereafter he was not able to contact the police. The reason given by this witness does not seem to be probable. If that be so, he could have personally gone to the police station and completed the message as the police station is hardly at the walking distance of 2 to 3 minutes from his place. No attempt has been made by him to do so.

6.3. So far immediate disclosure of the names is concerned, Karsanbhai's evidence shows that he had contacted Beniben, widow of deceased immediately after the incident, but to her also no names were disclosed and she was only told that the ladies should not go out of the house. As against that, the evidence of Beniben is that Karsanbhai had told her that Vaghajibhai was being beaten by the appellants and Gagji with Dhariya and Lathis. This part of the evidence of Beniben does not inspire confidence since it does not get any support from the evidence of Karsanbhai. Secondly, had that been the case, Beniben's natural reaction would have been to raise hue and cry and to rush to the scene of offence to help her husband and to find out what had happened to him. Nothing of the sort has been done by her and according to her it was only at about 10.00 p.m. she was told that her husband had died. Her evidence, therefore, also goes to show that to her no names were revealed by Karsanbhai. Thus, the evidence on record shows that the conduct of the sole eye witness, namely Karsanbhai was not a natural one. If that be so, his evidence becomes very doubtful. Since the evidence of Karsanbhai cannot be accepted, at its face value, we are required to look to other circumstances which may support his version. However, considering the evidence of Bhavanbhai, Himabhai and Beniben, even no reliance can be placed on their evidence leave apart seeking any corroboration from it. Over and above this, the other circumstances such as discovery of weapons, the blood stains on such weapons, the prosecution has completely failed to produce satisfactory evidence. The discovery is not proved. There is also evidence to show that the weapons which were alleged to have been carried by the assailants did not bear any blood stain. On this aspect also, therefore there is no

corroboration to the case of the prosecution. Mr. Barot has placed reliance on several decisions of the Hon'ble Apex Court which laid down the principle that when there is a sole witness, whose evidence is neither wholly acceptable nor wholly discarded, the Court should proceed to seek some corroboration. This attempt has been made by us. But it appears that there is no satisfactory evidence available by way of corroboration to the evidence of sole eye witness.

7. In view of the aforesaid discussion, it appears that the case of prosecution is not free from doubt and the benefit thereof should go to the appellants. The appeal of the appellants is, therefore, required to be allowed and the conviction of the appellant no. 1 for offence u/S. 302 of the IPC and of the appellants nos. 2 and 3 for offence u/S. 325 read with sec. 34 of the IPC is required to be quashed and set aside.

8. In the result, the Criminal Appeal No. 18 of 1995 is allowed and appellant no. 1, who is undergoing sentence of imprisonment is directed to be set at liberty forthwith, if not required for any other purpose. Appellants nos. 2 and 3 are on bail and hence their bail bonds shall stand cancelled.

The State's appeal being Criminal Appeal No. 199 of 1995 is hereby dismissed.

Muddamal to be disposed of in accordance with the directions given by the Ld. trial Judge.

9. Misc. Criminal Application No. 9277 of 2002 in Criminal Appeal No. 18 of 1995 is filed on behalf of the appellant no. 1 for seeking bail pending hearing of the appeal. Since the appeals are disposed of, no order is required to be passed on the Misc. Criminal Application.

[ M. H. KADRI, J. ]

[ AKSHAY H. MEHTA, J. ]

* Pansala.